

FILED BY CLERK

JAN 14 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

PAUL DAVID CUTLER,	)	
	)	2 CA-CV 2010-0133
Petitioner/Appellant,	)	DEPARTMENT A
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
TRACI JEAN CUTLER,	)	Rule 28, Rules of Civil
	)	Appellate Procedure
Respondent/Appellee.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20072757

Honorable Nanette M. Warner, Judge

AFFIRMED

West, Christoffel & Zickerman, P.L.L.C.  
By Dean C. Christoffel

Tucson  
Attorneys for Petitioner/Appellant

Karp & Weiss, P.C.  
By Patrick P. Lacroix

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Attorneys for Respondent/Appellee

B R A M M E R, Presiding Judge.

¶1 Paul Cutler appeals from the trial court’s order granting Traci Cutler’s request to enforce their decree of dissolution, ordering Paul to pay Traci \$1,000 per week for eighty-four weeks, and awarding Traci reasonable attorney fees and costs. Paul argues the court erred in denying his request either to join Cutler Landscaping, Inc. (Cutler) as a party or to consolidate the domestic relations case with a civil case filed by Cutler against Traci. Consequently, Paul argues, he was denied the opportunity to argue Cutler’s “defenses and offsets.” We affirm.

### **Factual and Procedural Background**

¶2 “We view the facts in the light most favorable to upholding the trial court’s ruling.” *Hammoudeh v. Jada*, 222 Ariz. 570, ¶ 2, 218 P.3d 1027, 1028 (App. 2009). During their marriage, Paul and Traci worked for Cutler, a business Paul owned before he and Traci were married. Paul and Traci amicably agreed to dissolve their marriage, entering into a consent decree of dissolution (decree), which included a marital settlement agreement and addendum (agreement). Among other provisions, the agreement provided Traci weekly income of \$750 from Cutler so long as she remained its employee, then she was to receive 104 weekly payments of \$750 beginning immediately after that employment ended, to be followed by 104 weekly payments of \$1,000. The agreement stated that Paul assumed and agreed to pay any debt, obligation, or charge incurred either by him or Cutler. The agreement did not award spousal maintenance to either party.

¶3 Paul started making the weekly payments required by the agreement to Traci out of his personal account after her employment with Cutler had ended. Because

Traci was late making monthly payments on a loan for which she was responsible, but that was an obligation of both she and Paul, Paul began making the payments, deducting the payment amount from her weekly payments. Paul paid the loan in full with money he acquired from an equity line of credit, but began deducting from Traci's payments an amount three times the monthly payment she had been making on the loan. Paul also unilaterally deducted from her weekly payments additional amounts he claimed were expenses for the benefit of their daughter and attorney fees awarded against Traci in another proceeding. Eventually Paul stopped paying Traci anything. Traci filed an amended petition to enforce the decree.

¶4 Paul filed a motion to consolidate the domestic relations case with a civil case Cutler had filed against Traci. Cutler had alleged in the latter action that Traci owed the corporation money for an obligation that arose from her employment as a payroll clerk when she allegedly fraudulently had overpaid another Cutler employee and had made other fraudulent payments. The trial court denied the motion to consolidate, rejecting Paul's claim that Cutler's action against Traci constituted a mandatory counterclaim because, the court determined, he had assumed Cutler's debt to Traci in the agreement.

¶5 The trial court granted Traci's request to enforce the decree and ordered Paul to pay her eighty-four payments of \$1,000 per week. It found Paul had violated the agreement and decree by paying off Traci's loan rather than continuing to make monthly payments and by deducting unauthorized amounts from her weekly payments. The court

also awarded Traci reasonable attorney fees and costs of \$5,065.51 pursuant to A.R.S. § 25-324, finding that Paul's position was "unreasonable, without merit and vindictive." This appeal followed.

## **Discussion**

### **Motion to Consolidate**

¶6 Paul alleges the trial court erred in denying his motion either to join Cutler as a third party to the domestic relations case or to consolidate the domestic relations and civil cases. He argues that because the agreement required Cutler to pay Traci weekly income, Cutler's interests "were injuriously affected by its not being a party to the action," and its due process rights were violated because it was not allowed to argue its position before "being held accountable." We review the court's discretionary rulings for an abuse of discretion. *See State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶7 Rule 33(C), Ariz. R. Fam. Law P., states that "[u]pon timely application, the court may join additional parties necessary for the exercise of its authority." Rule 33(D) states that "[u]pon timely application, the court may allow a third party to intervene in an action if necessary for the exercise of the court's authority." Rule 33(G) provides procedures for responding to the pleading of a party joined "[i]f the motion to join or intervene is granted." Only "[a] party to a family law case may file a statutory claim against another party, or against a third party arising out of or related to the subject matter of the action . . . without prior leave of court." Ariz. R. Fam. Law P. 33(A).

These rules clearly show that the decision to join parties or consolidate actions is within the trial court's discretion. *See Crum v. Maricopa County*, 190 Ariz. 512, 514, 950 P.2d 171, 173 (App. 1997) (use of word "may" in statute indicates permissive); *see also Nikolous v. Superior Court*, 157 Ariz. 256, 259, 756 P.2d 925, 928 (1988) (trial court has discretion under civil rules to join third party).

¶8 The trial court determined that Cutler did not need to be joined as a party because in the agreement Paul had assumed the corporation's debt. The court stated that the only issue before it was whether Traci had received the money she was entitled to be paid under the agreement. It was unnecessary for the court to join Cutler in order to "exercise . . . its authority." *See Ariz. R. Fam. Law P. 33(C)*. Cutler was not a party to either the dissolution decree or the agreement, both of which clearly show Paul was responsible personally for the payments owed to Traci, and he is the only one she would have any recourse against to enforce that obligation. There is no legal connection between the debt owed Traci under the agreement and any separate debt she may owe Cutler. The court did not abuse its discretion in refusing either to join Cutler or consolidate its unrelated claim.

## **Judgment**

¶9 Paul also asserts the trial court erred in entering judgment against him individually and in determining he was indemnifying the corporation. He argues he cannot be liable to indemnify Cutler if it is not liable to Traci. Had he been able to prove Cutler's "defenses and offsets," he argues, he would have shown that Traci was not

entitled to payment under the agreement. We review the court's interpretation of a decree of dissolution de novo. *Cohen v. Frey*, 215 Ariz. 62, ¶ 10, 157 P.3d 482, 486 (App. 2007).

¶10 The agreement states in relevant part: “[Paul] hereby assumes and agrees to timely pay any and all monies now and hereafter due . . . on . . . any and all debts, obligations, and charges incurred by [Paul] or Cutler Landscaping, Inc. in the sole name of [Paul] or Cutler Landscaping regardless of the date incurred.” This provision plainly shows Paul assumed and agreed to pay any debt or obligation either he or Cutler incurred. Included in the agreement is Cutler's obligation to pay Traci weekly, but that if it failed to make those payments, Paul—not Cutler—ultimately was responsible to make them. The trial court correctly determined Paul had assumed Cutler's debt in the agreement.

¶11 Paul's contention that Traci would not have been entitled to payment under the agreement had he been able to prove Cutler's offsets also is incorrect. A setoff, or counterclaim, entitles a defendant to bring a cause of action “in favor of the defendant [if] he might have brought a separate action against the plaintiff and recovered a judgment.” *W.J. Kroeger Co. v. Travelers Indem. Co.*, 112 Ariz. 285, 287, 541 P.2d 385, 387 (1975). That principle, however, does not entitle a defendant to assert the setoff of another. Moreover, as discussed, Paul could not bring Cutler's unrelated counterclaim on its behalf in the domestic matter. *See* Ariz. R. Fam. Law P. 33(A) (only party to family law case may bring counterclaim “arising out of or related to the subject matter” of the family law action). Again, Cutler's obligations, and in turn Paul's, under the agreement are in

no way connected to any obligations Traci may either owe or incur separately to Cutler. The trial court was required to determine only what was owed Traci under the agreement and it correctly entered judgment in accordance with that determination. Paul and Cutler's obligations under the agreement are not relieved by any amount Traci may owe Cutler in a different context.

### **Attorney Fee Award**

¶12 Paul also alleges the trial court erred in awarding Traci her attorney fees after finding his actions unreasonable and vindictive. He argues that, had he been allowed to raise Cutler's "defenses and offsets," he would have demonstrated his position was reasonable. He also argues that had he been able to show Traci fraudulently had obtained money from Cutler, a different interpretation of the relative financial positions of the parties would have resulted. We review the court's award of attorney fees for an abuse of discretion. *In re Marriage of Pownall*, 197 Ariz. 577, ¶ 26, 5 P.3d 911, 917 (App. 2000).

¶13 Section 25-324 authorizes a trial court to award attorney fees in a dissolution proceeding "after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." The court evaluates each party's legal position using an objective standard of reasonableness. *In re Marriage of Williams*, 219 Ariz. 546, ¶ 10, 200 P.3d 1043, 1045 (App. 2008).

¶14 The trial court did not abuse its discretion when it determined both that Paul had greater financial resources than Traci and that his position was unreasonable.

The record shows that the court carefully considered the financial resources of both Traci and Paul, noting the income of each, the balance in Paul’s savings account, and the fact that Paul was awarded all of their real property in the decree. The court noted that it “ha[d] gained some knowledge of Cutler Landscaping” throughout the hearings and believed that what Paul claimed he earned from the business “[wa]s not an accurate representation of his income,” particularly in light of his monthly expenses.

¶15 The trial court also considered the reasonableness of Paul’s position, noting his claim that he was entitled to offset money owed Traci under the agreement because she allegedly was indebted to Cutler was “without any basis in law and was a violation of the clear terms of the divorce decree and marital settlement agreement.” As we have explained, Cutler’s purported defenses are not available to Paul to avoid his obligations to Traci under the agreement and decree, and the court did not abuse its discretion in disregarding those defenses when determining the basis for the attorney fees award. *See* Ariz. R. Fam. Law. P. 33(A) (only claims of party to domestic action can be raised within such action).

### **Disposition**

¶16 For the reasons stated, we affirm the trial court’s grant of Traci’s request to enforce the decree, its order requiring Paul to pay Traci \$1,000 per week for eighty-four weeks, and its award to Traci of reasonable attorney fees and costs. Both parties request

an award of attorney fees and costs on appeal pursuant to A.R.S. § 25-324. We deny Paul's request and grant Traci reasonable attorney fees and costs upon her compliance with Rule 21, Ariz. R. Civ. App. P.

/s/ J. William Brammer, Jr.  
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge